

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 12851 OF 1994

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Date of Decision: 1/2/1996.

FOR APPROVAL AND SIGNATURE :

THE HON'BLE MR. JUSTICE M.S. PARIKH

1. Whether Reporters of Local Papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judges?

In all matters :

Mr. H.K. Rathod, L.A. for the petitioners

Mr. R.P.Bhatt, Senior Advocate with M/s. Y.S. Lakhani and P.G. Desai, learned advocates for the respondent.

CORAM : M.S.PARIKH, J.

February 1, 1996.

COMMON JUDGMENT :

The petitioners who have been holding the substantive posts of Divisional Traffic Officers (for short 'DTO') came to be temporarily promoted to officiate as Divisional Controllers. In so far as the petitioner in S.C.A. No. 12851 of 1994 is concerned he was so promoted with effect from 2/5/1990. In so far as the petitioner in S.C.A. No. 12853/1994 is concerned he was promoted as Divisional Controller by General Establishment Order No. SB/58/92 dated 3/5/1992. In so far as the petitioner in S.C.A.No. 12852/1994 is concerned he was promoted as such by General Establishment Order no. SB/60/90 dated 10/1/1990. The post of Divisional Controller carries the pay scale of Rs.3200-5600. After the respective petitioners served in the posts of Divisional Controllers for a term of about 3 years or more, as the case may be, they have been reverted to the posts of Divisional Traffic Officer by General Establishment Order No. SB/360/94, SB/359/94 and SB/358/94 all dated 19/11/1994 respectively. The petitioners in the respective petitions have brought under challenge these orders in these petitions under Article 226 of the Constitution of India.

The petitioner Mr. D.M.Patel (S.C.A. No. 12851/1994) was appointed in the post of Junior Assistant on or around 15/12/1964. He was confirmed in the post of Senior D.T.O. as per office order dated 12/7/1991 with effect from 10/5/1987. On or around 2/5/1990 he was promoted to the post of Divisional Controller of Nadiad Division for the period from 2/5/1990 to 31/5/1990. Thereafter, he was transferred as a Divisional Controller (Training) in Central Office for the period from 2/6/1990 to 30/3/1991. He was then transferred as Divisional Controller, Palanpur from 31/3/1991 to 10/4/1992. He was again transferred as such at Baroda from 11/4/1992 to 23/12/1992 and then to Himatnagar from 24/12/1992 to 18/6/1994. He was ultimately transferred as a Divisional Controller at Bhuj from 19/6/1994.

The petitioner Mr. Gordhanbhai S. Radadiya (S.C.A. No. 12852/1994) was appointed in the post of Traffic Inspector in the respondent-Corporation on or around 1/3/1966 and came to be promoted on the basis of seniority in the post of Depot Manager "A", Class-II Senior at Palanpur on or around 9/4/1980. He was confirmed in Class-II post of (Senior) vide Office Order no. 169/81 with effect from 29/4/1981. He was promoted to the post of Divisional Controller on or around 10/1/1990 and was posted at Surat Division. The petitioner was confirmed in the post of Class-I cadre in the Senior D.T.O. with effect from 31/8/1985. From 10/1/1990 to 19/11/1994 the petitioner continued to work in the post of Divisional Controller without any break.

The petitioner Mr. Nathalal Dhirajlal Dave (S.C.A. No. 12853/1994) joined the service of the Corporation in the post of Clerk on or around 28/11/1959 and was selected in the post of Traffic Inspector by way of direct selection on or around 1/7/1967. On or around 1/8/1972 the petitioner was selected in the post of D.T.S. in the same manner and was posted as a Depot Manager (A) at Upleta Depot. With effect from 11/5/1990 the petitioner was confirmed in Class-II post of D.T.O. vide Office Order No. 104/90 and was promoted to the post of Senior D.T.O. with effect from 2/6/1990. The petitioner was then promoted to the post of Divisional Controller in the Central Office with effect from 3/3/1992 and thereafter was transferred on 13/4/1992 at Bhuj Division where he worked upto 18/5/1994. He was then transferred as Divisional Controller (Trg.) with effect from 30/5/1994 in the Central Office at Ahmedabad where he worked upto 22/9/1994 and then in the Central Office itself he was transferred as Divisional Controller (Research) from 23/9/1994.

At the time of hearing of the arguments some controversy did arise with regard to nature of the promotions of the petitioners. However, ultimately it has transpired that the promotions of the petitioners to the posts of Divisional Controllers are temporary and officiating, but such promotions have been issued on the basis of seniority-cum-merit. The reason why temporary promotions to officiate as Divisional Controllers have been issued could be traced from the order passed by this Court (Coram : M.B. Shah, J. as His Lordship then was) in a pending Writ Petition bearing Special Civil Application No. 5426 of 1986, the controversy wherein is admittedly with regard to the cadres from which the post of Divisional Controller should be filled up. The order reads as under :-

"Rule. By way of interim arrangement it is agreed between the petitioner and respondent that promotion to the post of Divisional Controller in Gujarat State Road Transport Corporation may be made on officiating basis in the ratio of 1:1 from both the feeder cadres which would be subject to final outcome of this petition. Order accordingly. 18/12/1989."

In view of such peculiar facts attending the nature of the promotions of the petitioners, it cannot be said that the petitioners were regularly promoted. In any case the promotions are officiating pursuant to the order of this Court as stated hereinabove. In the facts of this case, the decision in the case of Rishal Singh v. State of Haryana & Ors. reported in JT 1994 (2) S.C. 157 would not be applicable. In that case the appellant was recruited as a Constable and was temporarily promoted as Head Constable by an order passed by the Deputy Inspector General of Police with immediate effect in an existing

vacancy. It was stated in the order that he had no right to claim seniority over his seniors, etc. and he would be reverted at any time without any formality of show cause notice. Subsequently when he was sought to be reverted he filed a writ petition, but the High Court dismissed it. In the appeal by special leave the Supreme Court found that an ad-hoc or temporary promotion is permissible for administrative exigencies. But it must be traceable to statutory source of power or instructions having force of law and as no such rule was brought to the notice of the Court, the only conclusion that could be drawn would be that the promotion of the appellant under rule 13.8(2) was on regular basis although it was specifically said to be on temporary or ad-hoc basis. The appellant there was considered in the sports quota and was found to be suitable in accordance with rule 13.8(2) of Punjab Police Rules, 1934. As stated above, in the background of the peculiar facts of the present case, this decision of the Apex Court would not be applicable. This Court even at the interim stage had an occasion to deal with the matter as if the petitioners who have been holding the substantive posts of Divisional Traffic Officers were temporarily promoted to officiate as Divisional Controllers while granting interim relief.

The case of the petitioners and the respondent in respect of the impugned reversion orders may now be set out and considered.

The petitioner Mr. D.M. Patel has set out the facts with regard to his service record being clean except that while working as a Divisional Controller, Himatnagar he was served with one charge-sheet dated 2/5/1994 in respect of alleged irregularities and negligence displayed while conducting the examination for the post of Conductor. It is the case of the petitioner that no departmental inquiry has yet been started by the respondent Corporation. No other action has also been taken in that respect against the petitioner. One Mr. M.S. Pandya junior to the petitioner has been working as a temporary Commercial Superintendent equivalent to Divisional Controller. Some Class-II senior officers working on traffic side and junior to the petitioner are also working on a temporary basis as Divisional Controllers. One Mr. S.B. Sorathia is temporarily promoted as a Divisional Controller at Palanpur. One Mr. K.A. Baria is also temporarily promoted to the post of Divisional Controller at Valsad Division. One Mr. D.D. Shukla has been temporarily promoted to the post of Divisional Controller at Mehsana. One Mr. P.R. Trivedi has been temporarily promoted to the post of Divisional Controller at Himatnagar and one Mr. K.M. Sangaretiya is temporarily promoted to the post of Transportation Superintendent in the Central Office which is equivalent to the post of Divisional Controller. Thus, the officers who are working in a cadre below the cadre in which the

petitioner was working are promoted temporarily and those who are juniors to the petitioner are working in the posts of Divisional Controllers. Retaining the juniors the petitioner has been sought to be reverted without assigning any reason in the impugned order of reversion. On reversion the petitioner is transferred at Junagadh Division as a Senior D.T.O. where Mr. L.R. Vaghela working as a Divisional Controller is junior to the petitioner.

There was a meeting of all the Divisional Controllers with the Managing Director on 14/11/1994 at about 11.30 A.M. In the said meeting Shri Rambhadrans, Managing Director, Shri Bukhari, Joint Managing Director, Shri Chauhan, General Manager (Admn.), Shri K.B. Patel, General Manager (Tech.) and Shri Saiyed, Executive Director (Vigilance) were present. The petitioner attended the said meeting, which was continued upto 5.30 p.m. In that meeting there was a discussion with regard to the progress of various divisions. The petitioner has pointed out progress of his division in detail. Between 5.30 p.m. and 7.30 p.m. there was discussion about the distribution of vehicles for Kartiki Poonam fair for various divisions.

It is then the case of the petitioner that other Divisional Controllers working temporarily had received charge-sheets issued against them and against some of them departmental inquiries are also pending. They are Mr. Panchal, Divisional Controller, Bhavnagar, Mr. D.L. Bhatt, Divisional Controller, Godhra and Mr. Pachigar, Divisional Controller, Bharuch. There are certain more facts not in dispute, have been brought on record. The respondent-Corporation issued a letter dated 10/11/1994 to the petitioner and other Divisional Controllers working in the Divisions setting out the profit analysis of the Divisions and calling upon the petitioner and the other Divisional Controllers to show cause why the liabilities should not be fastened upon the petitioner for the said loss and why departmental inquiry should not be initiated and punishment should not be imposed on the petitioner. As the explanation of the petitioner was called for by the Managing Director of the respondent-Corporation, the petitioner submitted the detailed explanation dated 19/11/1994. But, before receiving the explanation or considering the same impugned reversion order came to be passed on 19/11/1994 i.e. on the same day.

In so far as the petitioner Mr. G.S. Radadiya is concerned, the facts run into almost similar compass in substance, with this difference : On 17/11/1994 at about 6.00 p.m. the C.T. & C.M. Shri Soni had telephoned the Divisional Office at Amreli communicating a message that on 19/11/1994 the Divisional Controller and D.M.E. were required to remain present at the Central Office, Ahmedabad in the office of C.T. & C.M. for discussion of progress of Mechanical side. The petitioner was sick on 19/11/1994 and, therefore, could not attend the said

meeting. Hence only D.M.E. remained present in the said meeting. Thereafter, C.T. & C.M. came with D.M.E. from Ahmedabad to Amreli at about 6.30 p.m. on 19/11/1994, met the petitioner at his residence and the impugned order of reversion and transfer was served upon him. Some named officers are also junior to the petitioner, officiating as Divisional Controllers and, therefore, the facts with regard to this cause are not repeated.

In so far as the petitioner Mr. Nathalal D. Dave is concerned, the facts are almost similar in substance with a difference that Shri Panchal, Shri Bhatt and Shri Pachigar temporarily working as officiating Divisional Controllers are junior to the petitioner and they have been served with charge-sheets and are facing departmental inquiries.

The challenge levelled against the impugned order of reversion in the background of the aforesaid facts is that the orders are arbitrary, illegal as violative of rules of natural justice and discriminatory. According to the petitioners the respondent-Corporation has employed a short cut for proceeding departmentally against the petitioners. Their replies to the show cause notice with regard to losses in the divisions where they are working have not been considered at all. Thus, according to them the charges which the petitioners have been facing have provided foundation for passing impugned orders of reversion.

The stand of the respondent-Corporation is that the action of the withdrawal of temporary officiating promotions of the petitioners would tantamount to reversion simpliciter and not by way of punishment. According to the respondent the post of Divisional Controller is top most and highest post of division of the Corporation and the Division is under the general management and supervision of the Divisional Controller. About 2500 to 3000 employees are working under him. It is a very responsible post where the concerned officer is expected to discharge his duties with full efficiency, integrity and intelligence and also expected to control the overall operation of the division which include the efficient and smooth running of the administration of the entire division including recruitment process of the employees in the various cadres and profitability as well as the maintenance of financial position of the division affecting the ultimate profitability of the Corporation. During the tenure of the petitioner as a Divisional Controller his overall work and performance did not seem to be satisfactory and to the mark and level a Divisional Controller is expected to work and perform.

In so far as the petitioner Mr. D.M. Patel is concerned, during his tenure at Himatnagar Division number of complaints relating to maintenance, operation and condition of buses,

recruitment of the employees including their promotions and transfer were received. The petitioner tried to pressurise the respondent-Corporation in respect of his transfer through political media. Number of complaints were received which have bearing on the integrity. In the background of such facts the respondent-Corporation took a decision to withdraw the temporary promotion as a Divisional Controller granted to the petitioner only for administrative reason and in larger public interest.

The stand of the respondent-Corporation with regard to other two petitioners is almost the same. The stand of the respondent-Corporation, therefore, is that the decision to revert the petitioners is taken only for the reason of their unsatisfactory work and performance. The other grounds taken by the petitioners challenging the impugned reversion orders are denied.

It is in the aforesaid background of the facts and the reasons assigned by the rival parties in respect of the impugned reversion orders that the submissions made by Mr. H.K. Rathod, learned advocate for the petitioners and Mr. R.P. Bhatt, learned senior advocate for the respondent-Corporation may now be examined. In the first place, a synopsis of the decisions relied upon by them may be made.

Mr. H.K. Rathod, learned advocate for the petitioners has placed reliance upon the decisions in (1) P.C. Wadhwa v. Union of India reported in AIR 1964 S.C. 423 (2) Debesh Chandra v. Union of India reported in AIR 1970 S.C. 77 (3) K.H. Phadnis v. State of Maharashtra reported in AIR 1971 S.C. 998, (4) State of U.P. v. Sughar Singh reported in 1974 S.C. 423, (5) The Regional Manager & Anr. v. Pawan Kumar Dubey reported in 1976 (2) S.L.R. 44, (6) Nepal Singh v. State of U.P. reported in AIR 1985 S.C. 84, (7) Jarnail Singh v. State of Punjab reported in AIR 1986 S.C. 1626, (8) Om Prakash Goel v. Himachal Pradesh Tourism Development Corpn. Ltd. reported in (1991) 3 S.C.C. 291, (9) Bhagwan Shukla v. Union of India, reported in AIR 1994 S.C. 2480, (10) Karnail Singh v. State of Punjab & Ors. reported in 1995 II L.L.J. 296 and (11) K.S. Joy v. Indian Institute of Management & Ors. reported in 1994 (1) G.L.R. 57 - para.23 at page 69.

Mr. R.P. Bhatt, learned senior advocate for the respondent has canvassed the decisions in the case of (1) Samshersingh v. State of Punjab reported in AIR 1974 S.C. 2192, (2) State of Mysore v. M.K. Gangoli reported in AIR 1977 S.C. 1617, (3) State of Punjab v. Balbir Singh reported in AIR 1977 S.C. 629, (4) Commandore Commanding Southern Naval Area v. V.N. Rajan reported in AIR 1981 S.C. 965, (5) State of U.P. v. Prem Lata Misra reported in AIR 1994 S.C. 2411, (6) State of Orissa v. Dr. Pyari Mohon Misra reported in AIR 1995 S.C. 974,

(7) Sunilkumar v. Indian Oil Corporation reported in 1983 (1) G.L.R. 573 and (8) State of Maharashtra v. V.G. Koppa reported in AIR 1981 Bombay 131.

The broad principles applicable in the matter of reversion of a public servant from his officiating post to the substantive post have been succinctly stated in Parshotam Lal Dhingra v. Union of India reported in AIR 1958 SC 36 and comprehensively dealt with in the case of P.C. Wadhwa v. Union of India reported in AIR 1964 S.C. 423.

In P.C. Wadhwa's case the appellant, a member of the Indian Police Service and holding the substantive rank of Assistant Superintendent of Police (a post in the junior time scale of pay) in the State of Punjab, was promoted to officiate as Superintendent of Police, which was a post carrying a higher scale in the senior time-scale, and posted as Additional Superintendent of Police. After he had earned one increment in that post, he was served with a charge sheet and before the enquiry, which had been ordered, had started, he was reverted to his substantive rank of Assistant Superintendent of Police, the ground suggested for reversion being unsatisfactory conduct. No details of the unsatisfactory conduct were specified and the appellant was not asked for any explanation. At the time when the appellant was reverted, officers junior to him in the I.P.S. Cadre of the State were officiating in the senior scale. The order entailed loss of pay as well as loss of seniority and postponement of future chances of promotion. It was held that the order of reversion made against the appellant was in effect a 'reduction in rank' within the meaning of Art. 311 (2) of the Constitution, and inasmuch as he was given no opportunity of showing cause against the said order of reversion, there was violation of Art. 311.

The observations of the majority of the Court in Parshotam Lal Dhingra's case appear in para. 15 of the citation and they need be reproduced :-

"A reduction in rank likewise may be by way of punishment or it may be an innocuous thing. If the Government servant has a right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real

test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus, if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty. The use of the expression "terminate" or "discharge" is not conclusive. In spite of the use of such innocuous expression, the court has to apply the two tests mentioned above namely, (1) whether the servant has a right to the post or the rank or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to. If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Art. 311, which give protection to Government servant have not been complied with, the termination of the service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant."

What the Apex Court has further observed in P.C. Wadhwa's case may also be reproduced from para., 19 of the citation :-

"We are inclined to agree with this contention of the appellant. It should be made clear however that when a person is reverted to his substantive rank, the question of penal consequences in the matter of forfeiture of pay or loss of seniority must be considered in the context of his substantive rank and not with reference to his officiating rank from which he is reverted, for every reversion must necessarily mean that the pay will be reduced to the pay of the substantive rank. In the case before us the appellant has not merely suffered a loss of pay which was inevitable on reduction in rank, but he has also suffered loss of seniority as also postponement of future chances of promotion to the senior scale. A matter of this kind has to be looked at from the point of view of substance rather than of form. It is indeed true, as was pointed out in Parshotam Lal Dhingra's case, 1958 SCR 828 : (AIR 1958 SC 36) that the motive

operating on the mind of the Government may be irrelevant; but it must also be remembered that in a case where Government has by contract or under the rules the right to reduce an officer in rank, Government may nevertheless choose to punish the officer by such reduction. Therefore, what is to be considered in a case of this nature is the effect of all the relevant factors present therein. If on a consideration of those factors the conclusion is that the reduction is by way of punishment involving penal consequence of the order, even though Government has a right to pass the order of reduction, the provisions of Art. 311 of the Constitution are attracted and the officer must be given a reasonable opportunity of showing cause against the action proposed to be taken against him. Our conclusion is that in the present case the appellant was reverted by way of punishment, but he was given no opportunity of showing cause against the action proposed to be taken against him. Therefore, the order of reversion dated November 3, 1958 was in violation of the provisions of Art. 311 of the Constitution."

Mudholkar, J. on behalf of Subba Rao and Raghubar Dayal, JJ. and himself has observed in para. 33 at page 435 as under :-

"In the case before us Mr. Wadhwa was not reverted for an administrative reason like the unavailability of posts but for a different reason which we will indicate while dealing with the second point raised by him. Despite the fact that he holds a certain rank in the gradation list persons who also belong to the Indian Police Service and who were recruited to it subsequent to him have continued to hold or have been appointed to hold posts carrying salary in the senior scale. This would itself indicate that the action taken against him was by way of penalty or punishment. For, he has not only been reduced in rank but his promotion to the senior scale has also been withheld. This could only be done by holding a departmental inquiry and affording him an opportunity to show cause against the action proposed to be taken against him. Nothing of the kind was done and, therefore, on this ground alone the writ petition ought to have been granted."

On going through the rest of the decisions cited on behalf of the parties it clearly appears that one or the other facet of the principles quoted above has been highlighted. To summarise the legal position from all these decisions following broad propositions may be stated :-

(1) Reversion from officiating to the substantive post on the

ground of unfitness, unsatisfactory work or unsuitability is legal and permissible provided no stigma attaches such reversion and provided it is not by way of punishment.

(2) It is the substance of the order and not the form that would be a guiding factor.

(3) The fact of holding inquiry or intercepting a pending inquiry will not be decisive, but what is decisive is whether the order is really by way of punishment.

(4) In finding out the substance of the order and in finding out whether the reversion is by way of punishment or whether it attaches stigma, it is the basis or foundation of the order and not the motive for passing the order that would be relevant.

(5) It is settled law that the court can lift the veil of the innocuous order to find out whether it is the foundation or motive to pass the offending order. If misconduct is the foundation to pass the order then an inquiry into misconduct should be conducted and an action according to law should be followed. But if it is not the basis but the motive, it is not incumbent upon the authority to have the inquiry conducted (State of U.P. v. Prem Lata Misra AIR 1994 SC 2411).

(6) If there is an inquiry initiated on the charges of misconduct or inefficiency or corruption and if the services of a probationer (or temporary employee) are terminated without following the procedure of Article 311 (2) of the Constitution, such employee can claim protection. Likewise charges of inefficiency made in a given case attach stigma. Therefore, what is really decisive is whether the order is really by way of punishment. See Samshersingh v. State of Punjab reported in AIR 1974 SC 2192. Reduction in rank accompanied by a stigma must follow the procedure under Article 311 of the Constitution.

(7) It is not open to the competent authority to cut short a proposed disciplinary proceeding and revert an employee on the basis of the charges levelled against him. (Emphasis supplied)

At this very stage reference may be made to a decision of the Hon'ble Supreme Court in the case of State of U.P. v. Sughar Singh reported in AIR 1974 SC 423 referred to by Mr. H.K. Rathod for the petitioners. In that case the petitioner alone was reverted from his officiating post to his substantive post allowing others who were junior to him to retain their

officiating posts and the basis for such reversion was taken to be an adverse entry in his character. In the background of such facts the order of reversion was held to be by way of punishment and was held to be reduction in rank in violation of Articles 14 and 16 of the Constitution of India. This decision finds its consideration in the case of the Regional Manager v. Pawan Kumar Dubey reported in 1976 (2) S.L.R. 44. which has in turn been referred to in Commodore Commanding Southern Naval Area v. V.N. Rajan reported in AIR 1981 SC 965 (see page 967). The observations are to the effect that the orders of reversion passed as a result of administrative exigencies without any suggestion of malice in law or in fact are unaffected by Sughar Singh's case (supra) and they are not vitiated merely because some other Government servants junior to the one who is reverted have not been reverted. It has, therefore, to be seen whether the impugned orders have been passed as a result of administrative exigencies.

The petitioners have come out with a positive case about how they have been punished by way of a short-cut. The stand of the respondent-Corporation does not indicate any administrative exigency, but revolves round the charges of misconduct as particularised in the affidavit-in-reply. Though the ground suggested for reversion is unsatisfactory work in so far as the petitioners are concerned, the same does not figure in the impugned orders. That apart, the respondents have come out with a positive case that during the tenure of the petitioners a Divisional Controllers their overall work and performance were not satisfactory and to the mark and level a Divisional Controller is expected to work and perform, that number of complaints were received relating to maintenance, operation and condition of buses, recruitment (induction, promotion and transfer, etc.) of the employees in the division of different cadres, that the petitioners tried to bring political pressure upon the Corporation about their transfer and that number of complaints were received, which would have bearing on the integrity of the petitioners.

Over and above the aforesaid grounds of reversion agitated by the respondent-Corporation, it is apparent from further facts that the petitioners have been issued notices calling upon them to show cause as to why action as suggested in the notices should not be taken against them. The petitioners have replied the show cause notices on the day on which the impugned orders of reversion have been passed. It is, therefore, clear that there is no application of mind to the replies given to the show cause notices even for the purpose of finding out a short-cut. I had seen the files of the concerned petitioners. But they do not indicate application of mind on the part of the concerned authority with regard to the cause shown by the concerned petitioners. Besides, files of all the Divisional

Controllers who are officiating as such have not been shown so as to satisfy that a group action was taken for the purpose of assessment of the work and efficiency of the concerned officiating Divisional Controllers. It is an admitted position that before passing impugned orders of reversion no inquiry has been held against the concerned petitioner. As against this, the departmental inquiries or departmental proceedings are pending against some Divisional Controllers who are junior to the petitioners and yet they have been retained on their officiating posts. The cumulative effect of all these facts and circumstances would be that the impugned orders of reversion against the petitioners have been passed on the basis of the charges of misconduct which they have been facing. The petitioners have been working on the post for more than 4 years and have earned their increments while officiating as the Divisional Controllers. Hence, in the facts and circumstances of the case of the petitioners, it cannot be found that the charges as set out in the show cause notices as well as as set-out in the affidavit-in-reply have provided the motive for and not the foundation for passing the impugned orders of reversion. In my opinion the petitioners' case would, therefore, be governed by the ratio laid down in the case of P.C. Wadhwa (supra) quoted above.

Learned Senior Advocate Mr. R.P. Bhatt has in particular relied upon the Bombay decision in State of Maharashtra v. V.G. Koppar (supra). The principles applicable in determining the scope and applicability of Article 311 may be enumerated from para. 16 of the citation, as principle (c) has been relied upon in the present case :-

"(a) Art. 311 makes no distinction between permanent and temporary posts and extends its protection equally to all Government servants holding temporary or permanent posts or officiating in any of them. (b) Protection of Art. 311 is available only where the dismissal, removal or reduction in rank is sought to be inflicted by way of punishment and not otherwise. If the termination of services or reduction in rank is not by way of punishment Art. 311 (2) of the Constitution is not attracted. (c) To determine whether termination of service or reduction in rank is by way of punishment or not, one has to consider whether the servant has the right to hold the post from which he has been either removed or reduced. (d) In case of probationary or officiating appointments to a permanent or temporary post, there is no right, (e) Reduction in rank must be by way of punishment for it carries with it the penal consequences, and the two tests to be applied are : (a) Whether the servant has a right to the post or rank; and (b) Whether evil consequences visit, such as forfeiture of his pay or allowances or the

loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion."

It has been argued that to determine whether termination of service or reduction in rank is by way of punishment or not, one has to consider whether the servant has the right to hold the post from which he had been either removed or reduced and in case of a person holding officiating post he does not have a right to hold the post. However, as can be seen from principle (e) even if a person holds an officiating post, the reduction in rank might be by way of punishment, if evil consequences visit such as forfeiture of his pay or allowances or loss of his seniority or stoppage or postponement of his future chances of promotion. It goes without saying that where reversion is based on charges of misconduct or where the charges of misconduct provide foundation for such reversion it would certainly visit the concerned employee with evil consequences in one or the other form. In the case before the Division Bench of the Bombay High Court the plaintiff who was holding a temporary post as a probationer was, time and again, given warnings, memos for his unsatisfactory record and he was even told that if he did not improve his performance, a disciplinary action would be taken against him. It is in the background of such facts that the Division Bench of the Bombay High Court held that the provisions of Article 311(2) of the Constitution could not be said to have been attracted and that the plaintiff being a class by himself could not be said to have been discriminated. In the facts of the present case as noted above, the foundation of reversion in question clearly appears to be the charges of misconduct and when even reply to the show cause notices was not considered, the decision could not be said to be but arbitrary.

In above view of the matter and in the facts of the case, the impugned orders of reversion deserve to be quashed. Order accordingly. Rule made absolute with no order as to costs.

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The learned counsel for the respondents pray for stay of the operation of this order.

Heard. The operation of this order shall remain stayed for a period of four weeks from today.

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